STATE OF MICHIGAN

COURT OF APPEALS

JEAN CHAMBERLAIN, JEAN E. CHAMBERLAIN TRUST, and DOROTHY M. BRANAGAN,

Plaintiffs-Appellants,

v

TEDDY J. KRUTTLIN and JULIE A. KRUTTLIN,

Defendants-Appellees.

UNPUBLISHED
January 20, 2005

No. 248672
Alcona Circuit Court
LC No. 99-010268-CH

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

This is a property-line dispute between neighbors. Plaintiffs appeal from the trial court's judgment following a bench trial that dismissed their claims to a narrow strip of land and that awarded attorney fees to defendants. We affirm the dismissal of plaintiffs' claims but hold that the attorney fee award be vacated.

I

In the summer of 1999, defendants had a survey conducted in preparation for building a home on their lot. The survey showed that plaintiffs' narrow gravel driveway extended into defendants' lot by two feet. After defendants had their lot graded right to the "boundary line," plaintiffs sought an injunction to prevent defendants from placing a manufactured home on defendants' lot. Plaintiffs also sued to quiet title in the disputed strip on legal theories of acquiescence or adverse possession and pursued damage claims for trespass and damage to land. The court allowed defendants to place their home on their lot, but in light of the property-line dispute, the court enjoined them from putting their driveway over the disputed strip, pending resolution of this dispute. Ultimately, the court ruled in favor of defendants and ordered plaintiffs to pay defendants $8,000 in attorney fees.

II

Plaintiffs contend that the trial court erred when it (1) rejected their *unrecorded* 1958 survey and (2) found that the boundary between the lots should be fixed along a line shown on defendant's 1999 survey, as corrected.[1]

Plaintiffs say that, regardless of surveys, an old fence that a prior owner of defendants' lot removed in the 1980s established the boundary line either by the doctrine of acquiescence or adverse possession. Plaintiffs also assert that because older surveys must be preferred over newer ones if the original survey markers cannot be found, the court clearly erred in rejecting the 1958 survey that "showed" the boundary between Lots 4 and 5. But, except for arguing that "presumably [the fence] would have been placed on the boundary line," plaintiffs offered no evidence that this fence marked the boundary line between the two properties. Plaintiffs were not entitled to this presumption and were required to offer evidence both as to the boundary line and the location of the fence. Because plaintiffs failed to offer more than an assertion that the fence remnants marked the disputed boundary, the court did not need to reach plaintiffs' argument that, where a recognized fence line has been established for the required statutory period and has been accepted as marking a boundary, courts will not disturb those boundaries.

Plaintiffs also argue that the court clearly erred by fixing the boundary on the basis of defendants' 1999 survey, rather than the unrecorded 1958 survey. But plaintiffs failed to establish through proof that their unrecorded survey, which did not account for the shortage in the block or show where stakes had been set, was reliable. Just as with the fence, plaintiffs' survey argument fails because it presumes precisely what plaintiffs had the burden of proving, the boundary between Lots 4 and 5. That is, plaintiffs attempted to establish the validity of their survey by arguing that it shows the boundary as they believe it to be; however, the survey was being offered as proof of the boundary. Therefore, the court did not clearly err by holding that their survey did not establish the location of the disputed boundary.[2] Plaintiffs also did not carry their burden to show that their driveway was on the south side of the lot next to defendants' lot for the period necessary to establish acquiescence or adverse possession. There was inconsistent testimony at trial as to the location of the driveway serving plaintiffs' house, including testimony by plaintiff Chamberlain that suggested that the driveway was moved to the disputed strip only after 1990. Accordingly, we affirm the court's rulings that fixed the boundary and dismissed plaintiffs' claims against defendants.

III

---

[1] "This Court reviews the findings of fact by a trial court sitting without a jury under the clearly erroneous standard. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. In contrast, we review a trial court's conclusions of law de novo. Furthermore, where the trial court's factual findings have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000) (internal citations omitted).

[2] "Where more than one permissible view exists of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1985).

Plaintiffs also maintain that the trial court erroneously awarded defendants attorney fees.[3] The trial court's judgment awarded defendants "costs, including a reasonable attorney fee, in the amount of eight thousand dollars ($8,000)."

> In Michigan, it is well settled that the recovery of attorney fees is governed by the "American rule." Under the American rule, attorney fees are generally not allowed, as either costs or damages, unless recovery is expressly authorized by statute, court rule, or a recognized exception. Exceptions to the general rule are construed narrowly. [*Burnside v State Farm*, 208 Mich App 422, 426-427; 528 NW2d 749 (1995) (citations omitted).]

Defendants argue that MCR 3.310(D)(1)[4] authorizes a claim of damages for being "wrongfully enjoined or restrained." But, this Court held that "in Michigan, at common law the general rule is that there is no tort liability for wrongfully suing out an injunction." *Mayor of the City of Lansing v Knights of the Ku Klux Klan (aft rem)*, 222 Mich App 637, 646; 564 NW2d 177 (1997), citing *In re Pritchard Estate*, 169 Mich App 140, 149; 425 NW2d 744 (1988). Moreover, in *Pritchard Estate*, this Court discussed the majority rule, which is that the restrained party's remedy for wrongful injunction is limited to the amount of any bond required by the court issuing the injunction:

> This view is compatible with public policy encouraging ready access to the courts. . . . Since, as previously discussed, a party can seek modification of a preliminary injunction, and thus request an increase in the security, we prefer the majority view. [*In re Pritchard Estate*, *supra* at 152.]

Defendants initially requested security for any losses suffered from the court's refusal to allow their home to be delivered. But the court did not enjoin the delivery, and defendants did not seek other security. "A party for whose benefit a bond is given may, within 7 days after receipt of a copy of the bond . . . [give] notice that the party objects to the sufficiency of the surety. *Failure to do so waives all objections to the surety*." MCR 3.604(E) (emphasis added). The court ordered no security here and defendants waived any objection; therefore, the award of

---

[3] A court's authority to award fees or costs is a question of law reviewed de novo. *In re Adams Estate*, 257 Mich App 230, 236-237; 667 NW2d 904 (2003). However, "[w]e will uphold the trial court's award of attorney fees absent an abuse of discretion, i.e., where an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling." *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997) overruled in part on other grounds CAM Constr v Lake Edgewood Condo Ass'n, 465 Mich 549, 640 NW2d 256 (2002).

[4] MCR 3.310(D)(1) provides: "Before granting a preliminary injunction or temporary restraining order, the court may require the applicant to give security, in the amount the court deems proper, for the payment of costs and damages that may be incurred or suffered by a party who is found to have been wrongfully enjoined or restrained."

costs and fees to defendants was not properly made under any statute, court rule, or other exception to the American rule. Hence, the award of attorney fees was an abuse of discretion.

Affirmed in part. We reverse that portion of the trial court's judgment that awarded defendants attorney fees. We remand with instructions to vacate the portion of that award that represents an award of attorney fees. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra